KESANG LEASING SDN. BHD.

v.

DB CONSTRUCTION SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. D4-24-3434-87]
4 AUGUST 1989

CIVIL PROCEDURE: *Summary judgment: Order 14 Rules of the High Court 1980 - 1st and 2nd defendants sued as principal debtor and guarantors of 2 equipment leases - Unpaid rentals - Appeal by defendants against summary judgment on grounds of (1) delay in filing O. 14 application (2) plaintiff estopped in claiming unpaid rentals as plaintiff accepting late payment of rentals (3) charge of interest upon interest - Whether contravention of s. 11 of the Civil Law 1956 and (4) sums claimed are not reasonable under s. 75 of the Contracts Act 1950 - As for guarantor - No notice of demand sent to him.*

The plaintiffs obtained summary judgment under O. 14 of the Rules of High Court 1980 against the principal debtor and the guarantors of 2 equipment leases dated 29 September 1984 and 18 March 1985 and a guarantee dated 29 September 1984. The defendants appealed against the order of summary judgment and confined their arguments to the following:

(1) delay in the filing of the O. 14 application.

(2) the plaintiffs are estopped in claiming the unpaid rentals since the plaintiffs have been accepting late payments of rentals due on the 2 leasing equipments.

(3) there is a charge of interest upon interest thereby contravening s. 11 of the Civil Law Act 1956

(4) the plaintiffs have failed to prove that the sums claimed are reasonable under s. 75 Contracts Act 1950 and

(5) as regards the 2nd defendant's contention, there was no notice of demand sent to him.

Held:

[1] Acceptance of late payments does not amount to the plaintiff being estopped from enforcing its rights upon default under the 2 leases as the plaintiff had not altogether given up its rights to terminate the leases upon default.

[2] As the interest claimed by the plaintiff being 2% per month is in confirmity with item (15) of the Schedule which is incorporated in and attached to the 2 leases which have been agreed to by the 1st defendant as a contractual terms, it cannot now dispute such a charge as being contrary to s. 11 of the Civil Law Act 1956.

[3] Section 75 of the Contracts Act 1950 had no relevance to the facts of this case as the sums claimed by the plaintiffs are computed in accordance with cl. 17.4 of both leases and as this computation is a contractual term agreed to by the 1st defendant.

[4] There is no express requirement in the guarantee itself that the 2nd defendant's liability only arises upon service of notice of demand. In any event, the plaintiff had exhibited 2 AR registered letters both dated 1 April 1987, wherein its solicitors have demanded all sums due under the guarantee following the 1st defendant's breaches of the 2 leases.

[5] The delay of 3 months to the filing of the application under O. 14 Rules of the High Court 1980 cannot materially affect the liabilities of the 1st and 2nd defendants as delay, *per se*, without more, can never form the basis of a triable issue.

[Appeal dismissed with costs.]

Legislation referred to:
Civil Law Act 1956, s. 11
Contracts Act 1950, s. 75
Rules of the High Court 1980, O.14

For the 1st and 2nd defendants/appellants - Chew Swee Yoke; M/s. Chai Chew & Partners
For the plaintiff/ respondent - Lachaman; M/s. David Lingam & Co.

JUDGMENT

Siti Norma Yaakob J:

On 19 January 1989, summary judgment under O. 14 was granted against the 1st and 2nd defendants who are sued as the principal debtor and the guarantor of 2 equipment leases dated 29 September 1984 and 18 March 1985 and a guarantee dated 29 September 1984.

In their appeal against the order of summary judgment, although they have averred to a number of issues in their affidavits, before me, they confined them to the following.

1. Delay in the filing of the O. 14 application.
2. As regards the 2nd defendant, there was no notice of demand sent to him.
3. Since the plaintiff has been accepting late payments of rentals due on the 2 leasing equipments, the plaintiff is estopped in claiming unpaid rentals.
4. Section 11 of the Civil Law Act 1956 has been contravened in that there is a charge of interest upon interest.
5. The plaintiff has failed to prove that the sums claimed are reasonable under s. 75 Contracts Act 1950.

The 2 principal sums claimed by the plaintiff represent the unpaid rentals due on the 2 equipment leases. In the case of the first equipment lease dated 29 September 1984, there is documentary evidence to show that the 1st defendant defaulted paying all rentals due since January 1986 and as for the second lease dated 18 March 1985, default started in April 1986. By its defaults, the 1st defendant has clearly breached the terms of cl. 17.1(a) of both leases which entitle the plaintiff to either terminate the leases without notice and resume possession of the equipments or by written notice to the 1st defendant determine and end the lease and thereupon the 1st defendant shall no longer be in possession of the equipments with the plaintiff's consent. In this case, the plaintiff, through its solicitors, Messrs David Lingam & Co., sent 2 letters dated 1 April 1987 and 3 March 1987, terminating the 2 leases and demanded all unpaid rentals and interest.

Whilst it is true to say that the plaintiff had accepted late payments of rentals, the fact still remain that payments were made, although late, by the 1st defendant, but this does not mean that the plaintiff had altogether given up its rights to terminate the leases upon default. These defaults happened in January and April 1986 and there is no denial by the 1st defendant that it had failed to meet its obligations to pay the rentals due since January 1986 for the 1st

lease and April 1986 for the second lease. To that extent, acceptance of late payments does not amount to the plaintiff being estopped from enforcing its rights upon default under the 2 leases.

The sums claimed by the plaintiff are computed in accordance with cl. 17.4 of both leases and as this computation is a contractual term agreed to by the 1st defendant, s. 75 of the Contracts Act 1950 has no relevance to the facts of this case.

Likewise the claim by the 1st defendant that the judgment contains a charge of interest upon interest in contravention of s. 11 of the Civil Law Act 1956. I consider that the 2% per month interest as claimed by the plaintiff is in conformity with item (15) of the Schedule attached to the 2 leases that allows the plaintiff to charge such a rate of interests as late charges. As this is again a contractual term incorporated in both leases which have been agreed to by the 1st defendant, it cannot now dispute such a charge as being contrary to s. 11 of the Civil Law Act 1956.

As for the 2nd defendant's claim that he has not been served with a notice of demand, there is no express requirement in the guarantee itself that the 2nd defendant's liability only arises upon service of notice of demand. In any event, the plaintiff has exhibited 2 AR registered letters both dated 1 April 1987, wherein its solicitors have demanded all sums due under the guarantee following the 1st defendant's breaches of the 2 leases.

Lastly, the delay of 3 months from the time of the setting aside of the judgment in default of defence which had been entered against the 1st and 2nd defendants to the filing of the O. 14 application cannot materially effect the liabilities of the 1st and 2nd defendants as delay, *per se*, without more, can never form the basis of a triable issue.

As both the 1st and 2nd defendants had failed to show any triable issue in their appeal, I had accordingly dismissed it with costs.

Also found at [1989] 2 CLJ 1213